4-23-2015

Huber v. Lightforce USA, Inc. Respondent's Brief Dckt. 41887

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFFREY EDWARD HUBER, an individual,

Plaintiff/Appellant,

vs.

LIGHTFORCE USA, INCORPORATED, a Washington corporation, doing business as NIGHTFORCE OPTICS,

Defendant/Respondent.

Supreme Court No. 41887-2014

RESPONDENT'S REPLY BRIEF

Appeal from the District Court of the Second Judicial District of the State of Idaho in and for the County of Clearwater

Honorable Michael J. Griffin, presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This appeal concerns appellant Jeffrey E. Huber's ("Huber") ultimate termination from his position as a high level employee by respondent Lightforce USA, Incorporated d/b/a Nightforce Optics ("LFUSA" or "Lightforce") because of his unsatisfactory job performance. LFUSA offered Huber a 12-month notice period, LFUSA paid Huber his base salary, plus benefits during that time. After accepting final payment, Huber filed a lawsuit in Clearwater County seeking to recover an additional **$11 million** under two agreements: a Company Share Offer ("CSO"), which was a statutory ERISA "Top Hat" plan, and a Deed of Non-Disclosure, Non-Competition and Assignment, which Huber always called a "Noncompetition Agreement" or an "NDA" before this appeal.

The case proceeded to a bench trial on October 21, 2013, with Huber seeking approximately $3.5 million under the CSO and $200,000 under the NDA. Following six full days of presentation of evidence involving over 40 trial exhibits and testimony by 24 witnesses, the trial concluded on October 31, 2013. On December 10, 2013, the trial court entered its Findings of Fact and Conclusions of Law ("Findings") (*R 1409-21*) and a separate Judgment. *R 1422-23.* The trial court agreed in spades with LFUSA that Huber was terminated for unsatisfactory performance, stating:

> ***Huber often berated, belittled, and harassed employees. He micromanaged all phases of LFUSA and did not allow the department managers to properly perform their responsibilities***. Dennis tried to address ***Huber's dictatorial management style*** by installing a group management system where Huber would be director of research and development and be on the same management level as all of the other department managers. The department

managers (OMG) would meet and make joint decisions. ***Huber did not cooperate with the OMG and continued to interfere with other departments***. Dennis then removed Huber as the department manager for research and development and removed Huber from the OMG. The OMG then began to function as a group, but ***Huber continued to try and exercise influence over the other departments and continued to be hostile to other employees.***

Huber's demeanor and management style were unprofessional and directly interfered with the business operation of LFUSA.

Huber's actions in managing LFUSA as its vice-president were also unprofessional. As indicated previously LFUSA had a significant production problem at the end of June, 2010. Unfilled orders were excessive. Rather than address the issue by examining what needed to be done to increase production to meet the incoming orders and reduce the time needed to fill orders, ***Huber directed staff members to present false data to LFA's board of advisors to make it look like there was no production problem.***

Huber consistently hid information from LFA's board if he did not feel that it reflected favorably on himself.

The timing of Huber's termination from LFUSA was dictated by the other employees' threats that they would quit if Huber remained with LFUSA. However, the actual reasons for his termination were an accumulation of factors summarized in the August 3, 2011 letter (Plaintiff's exhibit P-31).

* * *

A reasonable person would find that Huber's actions as vice-president (failing to address production issues), management style, demeanor, and unprofessional treatment of LFUSA employees collectively amount to unsatisfactory performance.

R 1418-19 (emphasis added). According to the trial court, Huber's misrepresentation to LFUSA's Board not only amounted to unsatisfactory performance, but "***[t]his deceit on Huber's part amounts to willful misconduct, is a serious breach of company policy and procedure, and is fraudulent behavior . . . .***" *R 1415* (emphasis added). In issuing its Findings, the trial court also weighed the evidence presented and found the testimony of LFUSA's main witnesses—

Dr. Raymond Dennis ("Dennis"), Monica Leniger-Sherratt ("Leniger-Sherratt") and Hope Coleman ("Coleman")—credible, but ***the court also found that Huber's testimony was not credible***. *R 1414*. The trial court's credibility findings were never addressed in Huber's opening brief and are therefore not challenged in this appeal.

Against this background, the trial court concluded that Huber was entitled to damages of $180,000 under the NDA. Because Huber's employment was terminated for unsatisfactory performance, the trial court held Huber's right to benefits under the CSO were forfeited. Thereafter, the court awarded LFUSA $284,464.76 in attorney fees and costs as the prevailing party and refused to award Huber any of his attorney fees or costs. *R 1988*. Huber appealed nearly every issue.

B. The Course of Proceedings.

Although LFUSA disagrees with the substance of some of Huber's contentions, Appellant's Opening Brief adequately sets forth the course of proceedings in the trial court and the disposition of the case.

C. Additional Issues on Appeal.

LFUSA requests attorney's fees and costs on appeal pursuant to Idaho Appellate Rules 40 and 41, Idaho Code Sections 12-121 and 12-120(3), and 29 U.S.C. § 1332(g).

D. Statement of the Facts.

LFUSA is a Washington corporation owned by Dr. Raymond Dennis, an Australian citizen, with its principal operations in Orofino, Idaho. *R 193, ¶ 2; R 208, ¶ 2; Tr Vol. 6, p. 1115,*

LL. 1-7; R 571, ¶ 2. Dennis, as well as LFUSA's Board of Advisors ("Board"),[1] are located in Australia, *Tr Vol. 5, p. 775, L. 23 – p. 776, L. 2*, and formal communications between LFUSA's operations and its Board, as well as company-wide decision-making, occur primarily during monthly telephonic Board meetings. *Tr Vol. 2, p. 135, L. 25 – p. 136, L. 13; Tr Vol. 5, p. 775, L. 23 – p. 776, L. 9; id., p. 779, LL. 15-24.* Because of the interrelationship between operations in Orofino and the Board and President in Australia, open and transparent reporting by the managers in Orofino to Lightforce's Board and Dennis in Australia is critical to the business, *id., p. 774, LL. 8-20*, and the requirement that reporting be open, accurate and transparent was communicated to the managers in Orofino. *Id., p. 779, LL. 15-24.*

From 1997 through mid-2010, Huber served as LFUSA's Vice President. *Id., p. 767, LL. 7-15; Tr Vol. 4, p. 651, LL. 5-15; id., p. 699, L. 6 – p. 700, L. 5.* Because Dennis operated an international business from Australia, Huber's loyalty was key. *Tr Vol. 6, p. 1126, LL. 10-17; Tr Vol. 4, p. 653, L. 18 – p. 654, L. 4.* As Vice President, Huber was the primary person responsible for the overall management and operation of LFUSA's facilities. *Tr Vol. 4, p. 651, L. 16 – p. 654, L. 4.* As Vice President (and ultimately R&D Manager), Huber was highly compensated. Prior to his termination, Huber's executive compensation package included (1) a base salary of $180,000, (2) participation in Lightforce's simple ERISA qualified 401(k) plan, (3) full fringe benefits, including full health insurance, life insurance, accidental death and

[1] Dennis owns Lightforce Australia ("LFA"), in addition to LFUSA. *Tr Vol. 6, p. 1115, L. 23 – p. 1117, L. 6.* Both LFUSA and LFA are governed by the same Board. *See Tr Vol. 5, p. 775, L. 23 – p. 776, L. 2.*

dismemberment insurance, and short-term and long-term disability insurance, and (4) paid holidays. *Tr Vol. 5, p. 766, LL. 11-21.*

1. On October 9, 2000, Huber and Dennis sign the CSO (Ex. P-1).

In 2000, LFUSA relocated to Orofino, Idaho. *Tr Vol. 6, p. 1137, L. 9 – p. 1138, L. 3.* Relocation was a large and expensive undertaking for LFUSA. *Id., p. 1137, LL. 9-23.* Dennis expended considerable company resources to relocate staff, and purchase land and infrastructure and ensure the continued viability of the business. *Id.* Relocation was also a large undertaking for Huber, and prior to relocating, Huber requested additional compensation from Dennis. *Id., p. 1124, L. 7 – p. 1125, L. 20; id., p. 1137, L. 24 – p. 1138, L. 3; Ex. P-1.* In response, LFUSA offered him the benefits of the CSO, which was a supplemental executive or "Top Hat" plan that stated: "Lightforce USA Inc., offers Jeff Huber the following Goodwill, company share offer on the basis of long term employment and loyalty." *Ex. P-1, p. 1.* LFUSA did not offer the CSO to its other employees making the move. *Tr Vol. 6, p. 1129, LL. 9-13.* In fact, Huber was the only employee of LFUSA ever offered the opportunity to participate in the CSO. *Id.*

Per the terms of the CSO, Huber's receipt of its benefits (*i.e.*, goodwill) was expressly conditioned upon Huber's continued employment, loyalty and satisfactory performance with Lightforce.[2] The CSO contained a clear forfeiture clause, providing: ***"If Jeff Huber elects to leave voluntarily, or employment is terminated due to unsatisfactory performance, then all***

[2] *Ex. P-1, CSO, § 5* ("Jeff Huber to maintain his focus and business interests in LFUSA. As the business grows much of his role will become focused on new product development and the potential markets for their exploitation. Consequently it is essential that these areas be capitalised for the benefit of LFUSA."). As Dennis testified, where Dennis was working in Australia and operating a company in the United States, loyalty was everything. *Tr Vol. 6, p. 1126, LL. 10-17.*

goodwill is lost." *See Ex. P-1, § 4* (emphasis added). If Huber satisfied the contractual conditions, then goodwill would be paid to Huber in different ways, depending on the occurrence:

> a) Death, ill health or incapacitation of Jeff Huber – LFUSA take out insurance cover to the value of $1,000,000 on Jeff Huber. At the time Jeff Huber is paid via this insurance policy using his goodwill value, this is determined by two independent valuations. The cost of these valuations to be covered 50/50 by LFUSA and Jeff Huber.
>
> b) If Jeff Huber elects to leave voluntarily, or employment is terminated due to unsatisfactory performance, then all goodwill is lost.
>
> c) If Jeff Huber retires at a reasonable age and NO sale of business is pending ***he shall be given the option of exchanging the goodwill accumulated for shares in the company to the value calculated to be the equivalent to goodwill at the time.*** This is to be done using two independent valuations.

Ex. P-1, § 4 (emphasis added).

The life insurance policy authorized by section 4(a) was a $1 million term life insurance policy, with no cash value. *Ex. D-9 at 3*; *Tr Vol. 6, p. 1045, L. 18 – p. 1047, L. 1; R 1410.* LFUSA was to be the owner and beneficiary of that policy. *Tr Vol. 6, p. 1052, LL. 2-4; id., p. 1131, L. 14 – p. 1132, L. 18.* In the event of Huber's death, and after the two valuations, LFUSA would pay Huber's estate the value of Huber's goodwill. *Id.* The remainder of the funds in the policy, if any, would be used as "key man" or replacement funds to fill Huber's role. *Id.* LFUSA took no effort to separate or segregate the life insurance policy from the company's other assets. *R 571, ¶ 7.* The life insurance policy was not a mechanism to fund the CSO in the event of Huber's retirement or involuntary separation from service. *Tr Vol. 6, p. 1132, L. 19 – p. 1134, L. 3.* In the event of Huber's retirement, the CSO provided that he would have the

option of receiving cash from the general assets of the company or shares in the company. *Id. See also Ex. P-1, § 4(c).*

The CSO was not vested. *Tr Vol. 6, p. 1128, LL. 9-15.* Huber testified that he understood—when he signed the CSO—that he needed to continue to be loyal to LFUSA in order to be entitled to anything under the CSO, that he was required to maintain his focus and business interests in LFUSA in order to receive anything under the CSO, and that if his employment was terminated for unsatisfactory performance he would forfeit any benefit under the CSO. *See Tr Vol. 4, p. 653, L. 9 – p. 655, L. 8.* Despite this acknowledgment, Huber, on behalf of LFUSA, took out the $1 million term life insurance policy with Farm Bureau in 2003. *Ex. D-9.* Although Huber did not obtain approval from LFUSA to do so, he named himself as the "owner" of the policy and converted 50% of the death benefit, naming his parents 50% beneficiaries under the policy. *Tr Vol. 6, p. 1131, L. 8 – p. 1132, L. 18; id., p. 1054, L. 19 – p. 1055, L. 6.* On the insurance application he signed, Huber is represented as the "owner" of LFUSA.[3] *Id., p. 1050, L. 6 – p. 1052, L. 25; Tr Vol. 7, p. 1491, L. 14 – p. 1492, L. 1.* Huber had contributed no money to the company and was not even "an" owner of LFUSA, but instead was only an employee of LFUSA. *Tr Vol. 4, p. 650, LL. 4-15; id., p. 670, LL. 17-21.*

[3] Mike Asker, the Farm Bureau agent who issued the policy, testified that he was unclear about Huber's status, stating that he thought Huber "had a major part in the company, and I also knew he had partners overseas. So I knew that Jeff wasn't a full and sole owner of the business." *Tr Vol. 6, p. 1050, LL. 6-15.* However, Huber either affirmatively held himself out to the public as the owner of LFUSA during his tenure as Vice President or did not take any action to correct the misstatement with Mr. Asker. *See also Tr Vol. 7, p. 1491, LL. 14-22.*

In 2006, Huber (again signing an application identifying himself as the "owner" of LFUSA) converted $250,000 of the $1 million term policy into a whole life policy. *Tr Vol. 7, p. 1491, L. 14 – p. 1492, L. 1.* Huber did not seek or obtain Dennis's approval to make this conversion. *Id.* This time Huber, without Dennis's permission, made ***himself*** the owner of the $250,000 whole life policy and put his wife and LFUSA as 50% beneficiaries of that policy. *Id.*; *Tr Vol. 6, p. 1050, L. 16 – p. 1052, L. 25; id., p. 1132, LL. 8-18.* Dennis testified that he never gave Huber permission to name either Huber's parents as beneficiaries or to name himself as an owner of the policy, testifying that he had no idea Huber had done that. *Id., p. 1132, LL. 8-18.*

The evidence at trial did ***not*** establish that the cash value of any life insurance policy was available to Huber if Huber left the company. Huber testified that he did not have LFUSA's permission to name himself as owner of any policy. *Tr Vol. 7, p. 1491, L. 14 – p. 1492, L. 1.* Huber testified that he did not mean for that to happen.[4] Huber did not pay taxes on any benefit under the CSO—including premiums paid on the life insurance policies—during the term of his employment. *Tr Vol. 4, p. 657, LL. 1-13.* Huber further testified and introduced evidence that after he left the company he immediately had his wife return the built up cash value (approximately $14,000) of the $250,000 whole life policy to LFUSA because "***It was theirs***." *Tr Vol. 7, p. 1457, L. 8 – p. 1458, L. 20* (emphasis added); *Ex. P-88.*

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[4] *Tr Vol. 7, p. 1491, LL. 14-18.* Huber also testified that theft could be "assumed when you put something in your name." *Tr Vol. 4, p. 648, L. 25 – p. 649, L. 8.* Yet, during the course of his employment at LFUSA, Huber routinely titled LFUSA property in his own name, later claiming it was a "mistake." *See Ex. D-125* (Huber titled a company vehicle in his name); *Exs. D-20 and D-21* at RM0002; *Ex. D-22* at RM0054 (Huber received $2,000 value on a trade-in of an LFUSA company vehicle as a down payment on a personal vehicle).

2. A workforce planning review reveals a lack of formal communication structure and Huber's micromanagement of departments.

In November of 2009, Leniger-Sherratt accompanied Dennis to Orofino, Idaho, as an introductory trip to LFUSA.[5] *Tr Vol. 7, p. 1270, L. 24 – p. 1271, L. 10.* Following the visit Leniger-Sherratt recommended she conduct a workforce planning review of LFUSA. *Id., p. 1271, LL. 11-19.* In March 2010, Leniger-Sherratt and Dennis returned to LFUSA's Orofino facility to conduct the review. *Id., p. 1272, L. 9 – p. 1275, L. 7.* Leniger-Sherratt, over the suggestion of Huber that he be involved, privately interviewed LFUSA's department managers and people in key positions. *Id, p. 1274, L. 20 – p. 1275, L. 7.*

During their interviews with Leniger-Sherratt, LFUSA's managers reported that there was a lack of formal process for the entire team to get together and communicate as a group, a lack of departmental meetings, and confusion about the direction of the business. *Id., p. 1275, L. 8 – p. 1276, L. 10.* Management also reported that Huber micromanaged the departments, talked to individual members of the management group rather than the collective group, and did not allow the managers to manage their own areas of responsibility. *Id.* Huber's actions in jumping over department heads to talk directly to the staff was a frustration for all of the managers. *Id., p. 1277, L. 23 – p. 1278, L. 21; R 507, ¶¶ 6 & 7.* The feedback from the workforce planning review was the first sign to Dennis and Leniger-Sherratt that there was dysfunction

[5] Leniger-Sherratt was employed at Lightforce Australia Proprietary Limited as its Group General Manager. *Tr Vol. 7, p. 1267, LL. 13-25.* Leniger-Sherratt has served as Group General Manager since 2009. *Id.* As Group General Manager, Leniger-Sherratt is second in charge of Mr. Dennis's businesses. *Id., p. 1269, L. 19 – p. 1270, L. 3.* Leniger-Sherratt sat on the Board, and as part of that role developed the strategies for all of the businesses, including LFUSA. *Id., p. 1270, LL. 4-23.*

within LFUSA. *Tr Vol. 6, p. 1152, LL. 3-16*. Thereafter, Leniger-Sherratt collected the responses and developed a PowerPoint presentation. *Tr Vol. 7, p. 1276, LL. 11-25*; *Ex. P-8*. Leniger-Sherratt and Dennis sat down with Huber, showed him the PowerPoint slide by slide, and provided Huber feedback with regard to the issues identified during the review, including the need for Huber to facilitate openness, transparency, and communication. *Tr Vol. 6, p. 1152, L. 3 – p. 1154, L. 5; Tr Vol. 7, p. 1276, L. 16 – p. 1278, L. 21*. Leniger-Sherratt discussed with Huber the need for more routine communication between the United States and Australia. *Tr Vol. 7, p. 1277, L. 12 – p. 1278, L. 21*. Leniger-Sherratt also recommended that LFUSA hire a personal assistant/business manager to assist Huber in fulfilling his Vice Presidential responsibilities. *Tr Vol. 6, p. 1152, L. 17 – p. 1153, L. 7; Tr Vol. 7, p. 1281, L. 15 – p. 1282, L. 11*. Leniger-Sherratt recommended the assistant/business manager's role would be to attend meetings and alleviate the need for micromanagement, as well as to assist Huber in report writing. *Id.*

Huber appeared to take the information well, agreed to more routine communication, and agreed to hire a personal assistant/manager to assist him. *Tr Vol. 7, p. 1283, L. 6 – p. 1284, L. 10*. Huber even presented the outcome of the review to LFUSA's department managers during a meeting. *Id., p. 1284, L. 11 – p. 1285, L. 8*. Before Leniger-Sherratt and Dennis returned to Australia, LFUSA hired an individual named Jim Davis to assist Huber in fulfilling his obligations and objectives under his role. *Tr Vol. 6, p. 1152, L. 17 – p. 1154, L. 5; Tr Vol. 7, p. 1281, L. 15 – p. 1282, L. 11; id., p. 1285, L. 9 – p. 1286, L. 23*. However, things did not change. Immediately after Dennis and Leniger-Sherratt returned to Australia, Huber rebuffed the offer of help and instead diverted Mr. Davis to an IT-focused role. *Tr Vol. 6, p. 1154, LL. 6-15;*

Tr Vol. 7, p. 1304, LL. 11-21. Huber did not incorporate any of the recommendations from the review. *Tr Vol. 7, p. 1304, L. 22 – p. 1305, L. 12.* After leaving Idaho, Leniger-Sherratt started receiving concerning messages, primarily from Coleman, who was LFUSA's finance manager at the time[6], Jesse Daniels ("Daniels"), who was LFUSA's logistics and production manager, and Kyle Brown ("Brown"), who was LFUSA's sales and marketing manager. *Tr Vol. 6, p. 1154, L. 16 – p. 1155, L. 2; Tr Vol. 7, p. 1287, L. 22 – p. 1288, L. 14.*

3. Huber fails to promote an open and transparent organization, hiding information that he did not feel reflected favorably on himself.

As noted above, LFUSA's formal communication structure, as well as company-wide decision-making, occurred primarily during monthly telephonic Board meetings. *Tr Vol. 5, p. 775, L. 23 – p. 776, L. 9; id., p. 779, LL. 15-24.* When Huber was Vice President, LFUSA's department managers sent monthly reports regarding their departments to Huber and Coleman. *Id., p. 775, L. 23 – p. 776, L. 11.* The reports would then be consolidated and sent to the Board. *Id.* Lightforce had a policy of promoting an open and transparent workplace, a policy that had been communicated to Huber. *Id., p. 774, LL. 8-20.* Huber, however, did not promote an open and transparent workplace. *Id., p. 774, L. 21 – p. 775, L. 22.* Huber refused to allow Coleman to communicate with her financial counterpart in Australia. *Id.* Moreover, Huber routinely

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[6] In 2007 LFUSA hired Coleman as a Finance Manager. *Tr Vol. 5, p. 763, L. 13 – p. 764, L. 5; id., p. 765, LL. 4-22.* Coleman reported directly to Huber. *Id., p. 767, LL. 7-11.* Almost immediately after being hired, Huber began making directives to Coleman that Coleman felt were unethical. *Id., p. 767, L. 22 – p. 771, L. 17.* Huber's unethical directives included minor abuses of authority (i.e., directing Coleman to issue checks for invoices over and above Huber's $25,000 capital expenditure limitation) to falsifying reports to the Board. *Id., p. 767, L. 22 – p. 768, L. 21.*

instructed Coleman to make changes to monthly Board reports materially misleading the Board members by not providing them with the full picture and hiding potentially serious production and process issues at LFUSA. *Id., p. 776, LL. 12-14*. Huber routinely directed Coleman to remove information regarding lead times, scraps and rejects, and the economy. *Id., p. 776, L. 25 – p. 778, L. 4*.[7] On occasion, Mr. Huber would hand Coleman a red pen, sit over her shoulder, and direct her to cross out information in the reports. *Id., p. 780, L. 15 – p. 781, L. 3; id., p. 783, L. 22 – p. 784, L. 4*; *Ex. D-38*. The ultimate report to the Board would exclude the information Huber directed Coleman to remove. *Compare Ex. D-38* (Board reports received by managers) *to Ex. D-40* (final report sent to Board). Thereafter, during monthly conference calls to the Board, Huber would direct Coleman not to answer direct questions from the Board by muting the phone or putting his hand up in front of Coleman's face. *Tr Vol. 5, p. 785, L. 2 – p. 786, L. 6*.

Huber did not maintain his focus and business interests in LFUSA's growth, ordering managers to ship to plan to keep down Dennis's expectations about the potential growth of the company. Daniels, who was then LFUSA's logistics and production manager responsible for overseeing shipping and production, *Tr Vol. 6, p. 1063, L. 7 – p. 1066, L. 18*, testified that near

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[7] Lead times calculate the time between LFUSA's receipt of a customer order and its delivery of the product ordered to the customer. *Tr Vol. 5, p. 778, L. 23 – p. 779, L. 1*. Lead times are important because they signify the demand for LFUSA's product as compared to the capacity that LFUSA has to build product that is in demand. *Id., p. 779, LL. 2-11*. Scraps (*e.g.*, product loss due to an employee scratching a lens) could signify either a process issue or a training issue that needed to be addressed. *Id., p. 777, L. 14 – p. 778, L. 4*. Similarly, rejects could signify a process issue, such as failing to conduct a full inspection prior to sending a product off to the production line for modification. *Id.*

the end of LFUSA's fiscal year 2009, he reported projections to Huber concerning production numbers. *Id., p. 1069, L. 25 – p. 1071, L. 6.* LFUSA was running close to budget. *Id., p. 1070, LL. 14-22.* Huber instructed Daniels to quit shipping. *Id.* Huber told Daniels that "we'd done a good job and that, you know, if we exceeded budget, then the board and the owner would expect more out of us the following year." *Id., p. 1070, L. 16 – p. 1071, L. 6.* The same scenario played out at the end of fiscal year 2010. *Id.*[8]

4. Huber lies to the Board, then continues to deceive the Board by directing senior staff to falsify records.

LFUSA's fiscal year ended June 30, 2010. In preparation for the year-end Board meeting to be held on July 28, 2010, Coleman created a report showing that backorders (open sales)[9] were approximately $2.4 million for Lightforce's fiscal year ending June 30, 2010. *Tr Vol. 5, p. 792, L. 1 – p. 793, L. 9*; *Ex. D-63.* Coleman and LFUSA's Director of Sales and Marketing, Brown, then shared that information with Huber. *Id.* Huber indicated that the $2.4 million in backorders would not be reported to the Board, but that backorders should be reported at a substantially lesser figure. *Id., p. 795, LL. 4-16.* Following Huber's comments, Coleman became very concerned that Huber was going to falsify LFUSA's backorder report to the Board. *Id.,*

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[8] Huber's directions to only "ship to plan" were corroborated by Coleman, who testified Huber would instruct the production and shipping departments to stop shipping product if LFUSA was coming in around budget. *Tr Vol. 5, p. 771, LL. 4-17.* Huber would inform Coleman that if LFUSA shipped more than budget (*i.e.*, LFUSA's production was growing), it would only cause more work in the following year to show growth to the owner (Dennis). *Id.*

[9] LFUSA's system, called Oracle, reports all orders that are entered into the system. Backorders are those orders that are entered into the system that LFUSA has not yet invoiced and shipped out to the customer. *Tr Vol. 5, p. 799, L. 21 – p. 800, L. 1.*

p. 796, LL. 10-19. Coleman testified that falsifying the report "could hide a serious issue, and in our case it was hiding the fact that we had a serious capacity issue. We had $2.4 million in open orders, and it was going to increase our lead times. And we needed to increase our capacity in order to keep up with the demand for our product." *Id., p. 799, LL. 6-16*. Concerned for her integrity and job, Coleman called Leniger-Sherratt and apprised Leniger-Sherratt of her concerns. *Id., p. 796, L. 20 – p. 797, L. 4*. Coleman expressed to Leniger-Sherratt that she was very concerned that Huber would retaliate against her if he found out she was communicating with Leniger-Sherratt. *Tr Vol. 7, p. 1291, L. 25 – p. 1292, L. 17*. Separately, Brown also reached out to Dennis and Leniger-Sherratt. *Ex. D-64*. Both Coleman and Brown expressed their concern of retaliation to Leniger-Sherratt. *Ex. D-64*; *Tr Vol. 5, p. 796, L. 20 – p. 797, L. 4*.

On July 28, 2010, the Board meeting was held and Coleman and Huber attended via telephone conference from Orofino. *Tr Vol. 5, p. 790, L. 13 – p. 791, L. 10*. Leniger-Sherratt and Dennis were also present in Orofino. *Tr Vol. 7, p. 1290, LL. 8-21*. Brown attended via teleconference from Georgia, and the remaining Board members were in Australia. *Id.* During the July 28, 2010 Board meeting, "[t]he question was asked specifically of Mr. Huber of what our back order situation was, at the financial yearend on the 30th of June, 2010, and he told the board and Ray Dennis it was $1.1 million."[10] *Id., p. 1290, L. 25 – p. 1291, L. 5*.

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[10] Backorders of $2.4 million indicate a serious capacity issue and have a direct negative effect on lead times. *Tr Vol. 7, p. 1300, LL. 9-19; Tr Vol. 5, p. 779, LL. 2-7*. Backorders of this magnitude indicate that LFUSA needed to increase capacity in order to keep up with the demand for product. *Tr Vol. 7, p. 1300, L. 20 – p. 1301, L. 14*.

Following the Board meeting, Leniger-Sherratt discussed Huber's misreporting, as well as her concern that Huber might retaliate against Coleman and Brown, with Dennis and Dennis requested Leniger-Sherratt give Huber an opportunity to explain the backorder situation when Huber traveled to Australia the next month. *Id., p. 1292, L. 18 – p. 1293, L. 15.* Leniger-Sherratt contacted Geoff Inglis, who is the financial independent Board member in Australia, and Inglis developed a simple spreadsheet as a template to be given to Huber and Coleman to fill out. *Id.* Leniger-Sherratt requested that Huber and Coleman run the Oracle reports from May 2009, all the way through to June 2010 (the end of the fiscal year), and enter the reported number of open sales for each month. *Id., p. 1293, L. 16 – p. 1294, L. 14.* Coleman filled out the spreadsheet using the Oracle reports, which calculated open orders (backorders) of approximately $2,320,000. *Tr Vol. 5, p. 808, L. 22 – p. 809, L. 2; Tr Vol. 7, p. 1296, LL. 9-18*; *Ex. D-67.* Coleman shared the completed spreadsheet (*Ex. D-67*) with Huber. *Tr Vol. 5, p. 809, LL. 3-8.* Instead of reporting accurate information, Huber instructed Coleman to falsify the spreadsheet regarding the history of open orders in order to further perpetrate his fraud on the Board. *Id., p. 809, LL. 9-21; id., p. 810, LL. 1-14.* Coleman prepared a falsified spreadsheet at Huber's direction. *Id.*; *Ex. D-68.* Huber instructed Coleman to send the altered spreadsheet (*Ex. D-68*) to the Board in advance of Huber's trip to Australia. *Tr Vol. 5, p. 810, LL. 15-21.* Although neither Huber nor Coleman realized it at the time, the altered spreadsheet reflected negative open orders. *Ex. D-68.* (As Coleman later testified, "It is impossible to have negative unfulfilled orders." *Tr Vol. 5, p. 811, LL. 1-23.*)

On August 10, 2010, Leniger-Sherratt received the altered spreadsheet. *Tr Vol. 7, p. 1292, L. 25 – p. 1295, L. 16*; *Ex. D-68; Ex. P-17 at 3*. The alterations were so significant that they resulted in negative numbers being reported in the outstanding orders column, which Leniger-Sherratt knew was illogical because it is not possible to have negative numbers for outstanding open sales. *Tr Vol. 7, p. 1295, LL. 2-16*. Leniger-Sherratt knew that the spreadsheet altered at Huber's direction was inaccurate. Coleman shared with Leniger-Sherratt another spreadsheet that showed the accurate figures, based on the Oracle reports, and showed that the backorder figure in June 2010 was, in fact, close to $2.4 million. *Id., p. 1295, L. 17 – p. 1296, L. 18*; *Ex. D-67*. Based on the information she had received, Leniger-Sherratt generated an e-mail report dated August 31, 2010, in anticipation of the September 1, 2010, Board meeting that Huber was set to attend in Australia in person. *See Tr Vol. 7, p. 1306, L. 13 – p. 1307, L. 7*; *Ex. D-84*. The August 31, 2010, report detailed Leniger-Sherratt's concerns regarding the "accuracy and transparency of the NFO Board Information submitted." *Id.* The report detailed key concerns that "the board is either not receiving accurate information or organizationally we have risks in certain areas" and specifically addressed Huber's directive to Coleman to alter the spreadsheet to support his prior false report to the Board. *Ex. D-84*. The report culminated in a recommendation that "we need to get to a point prior to [Huber] leaving to head back to the US that he does not have the authority over other managers so we can be confident of the information being reported." *Id.* at 2.

Huber traveled to Australia and attended the September 1, 2010 Board meeting. *Tr Vol. 7, p. 1297, L. 18 – p. 1298, L. 5*. The Board communicated to Huber that the backorder figure

Huber had reported was incorrect, as was the spreadsheet, and provided Huber with an opportunity to explain. *Id., p. 1308, L. 7 – p. 1309, L. 18.* Huber did not explain. Instead, Huber blamed Coleman and indicated that Coleman must have made a mistake. *Id.*[11] At that meeting, the Board discussed with Huber their plans to restructure LFUSA, removing Huber as Vice President and instead creating a group of equal managers who would run LFUSA and report to the Board. *Tr Vol. 7, p. 1310, LL. 11-24.* Per Huber's request, Dennis agreed to let Huber report to LFUSA that it was his decision to step down as Vice President and become an equal manager. *Tr Vol. 6, p. 1158, L. 5 – p. 1162, L. 21.* Dennis agreed to let Huber report that the organizational restructuring was Huber's idea because Dennis wanted the transition to work, wanted to ensure that Huber did not lose respect from his team members, and wanted to give Huber an opportunity to put his best foot forward with his new role. *Id.* That decision was communicated to LFUSA in an e-mail dated September 30, 2010. *Ex. P-16.* Per the e-mail, the managers were directed—effective immediately—to provide their Board reports directly to the Board through Leniger-Sherratt. The e-mail advised that LFUSA would be seeking to appoint a consultant to facilitate the transition to a management group.

5. LFUSA creates the Operations Management Group (OMG).

The decision to create a management group was formalized, and Dennis and Leniger-Sherratt created what is referred to as the Operations Management Group (the "OMG").

[11] Following the Board meeting, Huber returned to Orofino and instructed Coleman that she needed to tell the Board that the actual open orders were presales for July, and the majority of those open orders happened in the last two weeks of June. *Tr Vol. 5, p. 812, LL. 3-25.* About a week later, Huber instructed Coleman that she needed to tell the Board that she made a mistake. *Id.*

Tr Vol. 7, p. 1316, L. 11 – p. 1318, L. 7. LFUSA created the OMG to develop an organizational program to transition Huber from Vice President to an equal member of management, with all the OMG members working together. *Id., p. 1315, LL. 13-25.* At this time Lightforce removed Huber from his position as Vice President and demoted him to the position of Director of the Research & Development ("R&D") Group, a member of LFUSA's newly-created OMG.[12] *Tr Vol. 7, p. 1315, LL. 5-25*; *Ex. P-16.* In November 2010, LFUSA hired a high-level consultant, William Borkett ("Borkett"), to facilitate Huber's transition from Vice President to manager as well as to get the team working effectively. *Tr Vol. 7, p. 1318, L. 1; id., p. 1378, L. 21 – p. 1379, L. 16.* Despite all LFUSA's efforts and expense, Leniger-Sherratt continued to receive negative feedback from the United States. The team reported that Huber continued to act as a Vice President as opposed to an equal peer of the other OMG members. *Tr Vol. 5, p. 813, L. 21 – p. 814, L. 22.* One of the first things Huber did after the OMG was formed was to make the unilateral decision to hire an employee without the OMG's input. *Id., p. 814, LL. 18-22.* Huber obstructed the OMG's efforts to implement business decisions that were going to grow the company and increase profitability. *Id., p. 814, LL. 5-8; Tr Vol. 7, p. 1325, L. 20 – p. 1327, L. 25.*[13] Huber continued to act in a rude and hostile demeanor to the other members of the

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[12] The OMG originally consisted of Huber (R&D), Brown (Sales & Marketing), Coleman (Finance Manager), Scott Peterson (Materials Manager), and Daniels (Production & Supply Manager). Debbi Duffy (HR Advisor) was later added to the OMG. In addition, Mark Cochran replaced Scott Peterson as Materials Manager on the OMG. *See generally, Tr Vol. 5, p. 813, LL. 4-17; id., p. 852, LL. 1-18.*

[13] Following Huber's notice of termination and removal from active employment, LFUSA implemented UPC coding, began selling to Cabela's and generated over $4 million in sales.

OMG. Huber even continued to hold himself out to the public using the title "Vice President" until May 2011, in violation of clear directives from the Board. *Tr Vol. 7, p. 1327, LL. 15-25.*

6. Huber executes the NDA.

In February of 2011, Leniger-Sherratt and Dennis were required to fly back to the United States to conduct a performance review of Huber. *Id., p. 1329, LL. 4-15.* During the February 2011 review, Leniger-Sherratt discussed with Huber "the fact that he was still micromanaging other departments."[14] *Tr Vol. 7, p. 1331, LL. 1-10.* Dennis made very clear to Huber during the conversation that this transition had to work and that he was running out of options with regard to Huber's employment. *Tr Vol. 6, p. 1160, LL. 10-22.*

Separately, during the February 2011 meeting the issue of Huber's execution of an NDA came up. Prior to returning to the United States, Leniger-Sherratt had requested Coleman to provide her with copies of everybody's signed NDAs. *Tr Vol. 7, p. 1334, L. 10 – p. 1335, L. 14.*[15] Leniger-Sherratt testified that having NDAs with key employees was essential to protect

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LFUSA also saved $1 million by implementing a new process whereby LOW Japan replaced components in products before shipping the products to LFUSA. *Tr Vol. 7, p. 1325, L. 20 – p. 1327, L. 14.*

[14] Leniger-Sherratt also told Huber that his management style was not a good fit with the company; that Huber had an intimidating style, needed to let go of control, needed to trust other employees, and needed to let the managers manage their own departments; and that Huber's management style could not continue going in the same direction. *Tr Vol. 4, p. 667, L. 17 – p. 669, L. 13.*

[15] In 2008, Leniger-Sherratt communicated with Huber that every LFUSA employee, including Huber, was required to have an NDA in place. *Tr Vol. 7, p. 1332, LL. 3-18*; *Ex. D-26.* Given that this was a directive from the Board, Leniger-Sherratt believed that Huber had obtained the requisite NDAs and had in fact signed one himself. *Tr Vol. 7, p. 1333, LL. 3-12.*

LFUSA's business interests in its intellectual property and confidential information. *Id., p. 1333, LL. 13-19; id., p. 1336, L. 19 – p. 1337, L. 2.* Coleman advised Leniger-Sherratt that there was no NDA signed by Huber or Brown. *Id., p. 1334, LL. 10-25.* When Leniger-Sherratt met with Huber, Huber advised Leniger-Sherratt that he had signed an NDA, which was a direct lie. *Id., p. 1336, LL. 1-14.* Leniger-Sherratt required Huber to sign an NDA in her presence, which he did. *Id., p. 1336, L. 19 – p. 1337, L. 14*; *Ex. D-132.* After Huber signed the NDA (*Ex. D-132*), Leniger-Sherratt reviewed the NDA and realized that a large portion of the NDA had been altered or removed from the original NDA, primarily as it related to noncompetition. *Tr Vol. 7, p. 1337, L. 23 – p. 1341, L. 17.* When confronted, Huber indicated that he had sought legal advice and was advised the NDA (*Ex. D-132*) was not enforceable. *Id.* Leniger-Sherratt then required Huber to execute a different NDA. *Ex. P-22.* The NDA provided in pertinent part that unless Huber was terminated for "performance related issues" or "summary dismissal," LFUSA would pay him an amount equal to his last annual base salary if he did not compete with LFUSA or obtain other employment for 12 months after the termination of his employment. *Ex. P-22.*

Between February 2011 and May 2011, Huber's department, R&D, was not getting as much project work completed as had been hoped. *Tr Vol. 7, p. 1343, LL. 1-18.* In April 2011, LFUSA removed military sales from Huber's responsibilities, consolidating military sales with the Georgia sales team. *Id., p. 1343, L. 19 – p. 1344, L. 14.* Leniger-Sherratt directed Huber to forward his military contacts to the LFUSA employee to whom military sales had been assigned. *Id., p. 1344, LL. 2-9.* Huber did not send the information through and in May Leniger-Sherratt made it a Board directive. *Id., p. 1344, LL. 9-14.*

At the end of May of 2011, Dennis and Leniger-Sherratt were required to make yet another change to Huber's employment status. *Id., p. 1344, L. 15 – p. 1345, L. 23.* Leniger-Sherratt and Dennis were forced to make a second trip to the United States in less than three (3) months to meet with Huber to discuss Huber's future role with LFUSA. During their May 2011 meeting, Leniger-Sherratt and Dennis advised Huber that they were removing Huber from the OMG and removing his responsibility for military sales and quality assurance. *Tr Vol. 6, p. 1160, L. 10 – p. 1162, L. 24*; *Ex. P-23.* It was clear that Huber's role on the OMG was not working. *Id.* Huber was still trying to micromanage. *Tr Vol. 7, p. 1344, L. 15 – p. 1345, L. 2.* He was still interfering in the other managers' teams by going over the managers' heads and talking directly to their staff. *Id.* LFUSA still wasn't getting the focus on R&D products that LFUSA wanted. *Id., p. 1345, LL. 8-23.* Dennis, Leniger-Sherratt and Huber discussed restructuring Huber's role purely into a R&D director role, removing him from the OMG. *Id., p. 1345, LL. 13-23*; *Ex. P-23.* During that meeting, Leniger-Sherratt and Dennis discussed with Huber an opportunity for Huber to take two months off to give the OMG members and Huber a break. *Tr Vol. 7, p. 1347, LL. 6-21.*

In June of 2011, while Huber was on a two-month leave, Borkett facilitated an OMG meeting. *Tr Vol. 5, p. 816, L. 8 – p. 818, L. 15; Tr Vol. 7, p. 1347, L. 6 – p. 1348, L. 5.* At the meeting, the members of the OMG expressed strong concerns about Huber coming back to the company in any active role. *Tr Vol. 5, p. 816, L. 8 – p. 818, L. 15.* The senior members of OMG were unanimous in their decision that they did not want Huber to come back to work at Lightforce. *Id., p. 816, L. 11 – p. 817, L. 4.* A number of the managers reported that they would

seek other employment if Huber returned to work at LFUSA. *Id.* The issue was so serious that Borkett facilitated a call to Dennis and Leniger-Sherratt. *Id., p. 817, LL. 8-21.* During the call, the OMG members expressed their fear about Huber returning to LFUSA in any role. *Tr Vol. 7, p. 1348, LL. 10-17; Tr Vol. 5, p. 817, L. 22 – p. 818, L. 1; id., p. 818, L. 16 – p. 819, L. 24.* The managers informed Dennis and Leniger-Sherratt that they would rather seek alternate employment than work with Huber in any capacity. *Id.*[16]

The news was so significant that Leniger-Sherratt and Dennis made immediate plans to go back to the United States to meet with the OMG face to face. *Tr Vol. 7, p. 1348, LL. 18-22.* On July 28, 2011, Dennis and Leniger-Sherratt made a third trip to the United States to address issues concerning Huber's performance. *Tr Vol. 5, p. 818, L. 16 – p. 819, L. 16; Tr, Vol. 7, p. 1390, L. 21 – p. 1391, L. 9.* Dennis and Leniger-Sherratt held an offsite meeting with Borkett, Debbie Duffy, Mark Cochran, Daniels and Coleman. *Tr Vol. 5, p. 818, L. 16 – p. 819, L. 16.* Many of the senior members of the OMG expressed that they would seek other employment if Huber returned to active employment. *See Id., p. 816, L. 11 – p. 817, L. 4; Tr Vol. 7, p. 1350, L. 12 – p. 1352, L. 9; id., p. 1351, LL. 17-21.* These managers also informed Dennis and Leniger-Sherratt about their concerns regarding a number of issues pertaining to Huber's performance, including Huber's request of a subordinate to purchase marijuana while at work, rumors

[16] Similarly, Kevin Stockdill expressed his concern that should Huber return to R&D, he was fearful that the other employees of that department (Huber's subordinates) would leave, which would set back the department at least five years. *Tr Vol. 5, p. 882, L. 19 – p. 884, L. 1.* Stockdill's fear was corroborated by the employees in R&D, Klaus Johnson and Corey Runia, who each testified, by way of declaration, that they had told Stockdill they would rather quit than work with Huber. *R 526, § 9; R 533.*

concerning Huber's falsification of a urine sample in order to fraudulently obtain insurance, his non-compliance with LFUSA's Federal Fire Arm ("FFA") licensing requirements, as well as his directive to ship scopes to Australia without the appropriate quality assurance. *Tr Vol. 7, p. 1351, L. 16 – p. 1352, L. 9; id., p. 1352, LL. 10-18.* Dennis was shocked and extremely disappointed about the news, given his long-term relationship with Huber. *Tr Vol. 6, p. 1166, L. 13 – p. 1167, L. 10.* Leniger-Sherratt testified that following reflection back on all the actions LFUSA had taken, all the changes they had made, on Huber's behavior and inability to assimilate or work effectively as a team member, Leniger-Sherratt and Dennis "ultimately decided that there was no other option other than to terminate Mr. Huber's employment." *Tr Vol. 7, p. 1353, L. 3 – p. 1354, L. 3.* Likewise, Dennis testified that the "ramifications of that was that we determined after going around the table and reconfirming that there was no more room for negotiation that I could do on behalf of Mr. Huber's return; that he had to be terminated. There was no way we could avoid that." *Tr Vol. 6, p. 1167, LL. 11-17.*

7. Huber's active employment duties end on August 2, 2011, and Huber is given 12 months' notice of termination with pay.

Following the July 28, 2011 meeting, Dennis did not decide to make a change to Huber's employment with LFUSA, Huber has represented on appeal—Dennis made the decision to terminate Huber's employment. *Id., p. 1167, LL. 11-17.* In fact, Huber testified that during a phone call preceding an in-person meeting Dennis told Huber that he was terminating Huber's employment. *Tr Vol. 2, p. 373, L. 10 – p. 375, L. 18.* Specifically, Huber testified:

> ***But I asked him, I said, so you're saying there's no place for me to build scopes at Nightforce at all or no place for me in Nightforce, and I can't build scopes anymore? He said, that's right.***

Id., p. 374, L. 22 – p. 375, L. 1 (emphasis added).

Thereafter, Borkett, Dennis and Leniger-Sherratt went to Huber's home and explained to Huber that they were terminating his employment for unsatisfactory performance. *Tr Vol. 6, p. 1171, LL. 8-10; Tr Vol. 7, p. 1324, LL. 1-2*; *Ex. P-31*. Huber himself testified that he was being "fired." *See Tr Vol. 2, p. 377, LL. 12-18*. Although not obligated to do so, Dennis offered Huber a 12-month notice agreement. *See Ex. P-30*. Pursuant to the notice agreement, LFUSA offered to continue to pay Huber his base pay and benefits (other than vacation pay) during the 12-month period between August 2, 2011 and August 1, 2012, with Huber's official termination date set at August 1, 2012. *Id. See also Ex. P-32* at NFO0687. Setting the termination date to August 1, 2012, as opposed to August 1, 2011, was intentional. *Tr Vol. 7, p. 1354, L. 16 – p. 1355, L. 19*. At that point in time, Dennis knew that Huber and his wife were trying to have a baby. *Tr Vol. 6, p. 1168, L. 23 – p. 1169, L. 17*. Thus, Huber and his wife remained covered by health insurance during the 12-month notice period. *Tr Vol. 7, p. 1355, LL. 2-5*; *see also Tr Vol. 2, p. 379, L. 15 – p. 380, L. 18*. Separately, Dennis testified that he offered Huber 12 months of pay because he wanted Huber to have an opportunity to find alternate employment, as well as an opportunity for a future relationship with Dennis so long as it was outside LFUSA. *Tr Vol. 6, p. 1169, LL. 1-17*. Huber's testimony at trial indicated that he understood the intent of the notice period. *See Tr Vol. 2, p. 379, L. 15 – p. 380, L. 18*.

It was made crystal clear to Huber that he would not be performing any further employment services for LFUSA. *See Ex. P-30 at 1.*

> You will not be active in your employment with NFO, any communication with NFO staff, suppliers, customers or interested parties shall be directed to the relevant NFO staff member responsible.
>
> You will relinquish any and all NFO owned property within 3 days of signing this agreement, this shall include any NFO owned IP/R&D files, inventions and/or any computer/cell phones and/or computer peripherals.
>
> You will be able to pick up any personal belongings from the office at a pre-designated time within 3 days of signing this agreement.

Ex. P-30 at 1. In the event Huber contravened the conditions, the benefits would cease. *Id.*

At the meeting, Huber requested that LFUSA document in writing the reasons for his termination. *Tr Vol. 6, p. 1170, L. 13; id., p. 1176, L. 7.* On August 3, 2011, during a second meeting with Huber, Dennis and Leniger-Sherratt provided Huber with the requested letter documenting the performance reasons for terminating Huber's employment at LFUSA. *Tr Vol. 7, p. 1361, L. 10 – p. 1362, L. 20*; *Ex. P-32.* The August 3, 2011, letter gave three key examples of the performance-related reasons for plaintiff's termination. The reasons listed included:

- The inability to promote an open and transparent organization regarding accurate reporting and factual information sharing with the Board – to the level where you instructed Senior staff to keep things "in-house" and directed them to change information before it was submitted to the Board, in complete contravention to the requests and direction given.

- The fact that you advised the Board in June 2010 there was approximately $1.4M in backorders when there was in fact over $2.4M – and an instruction given to the Finance Manager around that time to change figures in a spreadsheet to reflect your initial advice.

- The behaviour you have displayed and the anxiousness that behaviour created for a significant number of NFO staff, from management to shop floor

> personnel, has resulted in no option but to exit you from NFO. NFO had been put in a position where we were at risk of losing a large number of very key personnel in the event that your employment was continued. This is as a direct result of your management style, demeanour and the way you treated some members of the staff.

Id. at NFO0686.

At this second meeting, Huber asked Dennis what the termination meant to the benefits under his CSO. Dennis told Huber—***at that August 2011 meeting***—that his benefits were forfeited. *Tr Vol. 6, p. 1172, LL. 5-13.* Huber never performed another employment service for LFUSA. *Tr Vol. 4, p. 628, L. 5 – p. 629, L. 5.* During the 12-month notice period that Huber was uninvolved in the company, LFUSA implemented the changes that Huber so vehemently opposed. Coleman testified that during that 12-month period:

> We've grown the company from around approximately 63 employees to 110, approximately. We've added a second shift in production, a second shift in the machine shop. From that fiscal year July 1, 2011, through June 30th, 2012, we grew sales by 58 percent.

Tr Vol. 5, p. 820, LL. 6-14.

Despite being told in August 2011 that (1) LFUSA was terminating Huber's employment for unsatisfactory performance, and (2) that his benefits under the CSO were forfeited as a result of his termination for unsatisfactory performance, Huber sought to value his alleged benefits under the CSO as of August 1, 2012, seeking to take advantage of significant growth during the 12-month period when he was not even involved in LFUSA.

II. ARGUMENT

A. The District Court Correctly Held that the Amount Payable to Huber Pursuant to the NDA Was Not "Wages," as Defined by Idaho Code Section 45-601, and, Therefore, the $180,000 Judgment Awarded to Huber Should Not Be Trebled.

"The interpretation of a statute is a question of law over which [this Court] exercise[s] free review." *Paolini v. Albertson's Inc.*, 143 Idaho 547, 548 (2006) (citation omitted). "It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *Id.* Claims for wages are governed by chapter 6 of Title 45, Idaho Code, which defines wages as "***compensation for labor or services rendered by an employee***, whether the amount is determined on a time, task, piece or commission basis." IDAHO CODE § 45-601(7) (emphasis added). "The statute does not define wages as including all forms of compensation." *Paolini*, 143 Idaho at 549; *see also Moore v. Omnicare, Inc.*, 141 Idaho 809 (2005) (a claim for "future wages" due to breach of employment contract provision requiring payment for termination of employment without cause is not a claim for "wages" subject to trebling under Idaho law); *Whitlock v. Haney Seed Co.*, 114 Idaho 628, 630-35 (Ct. App. 1988) (court did not treble damages for "the loss of future wages" due to a breach of an employment contract requiring good cause for termination of employment).

Section 3 of the NDA[17] at issue in the case at bar (*Ex. P-22*) bears the heading "**NON COMPETITION**." *Id.* at NFO0341-42. Subsection 3.1 contains a 12-month post employment

[17] Huber insists that the NDA is an "Employment Contract," as if his mischaracterization of the nature of the agreement would render his damages award for breach of the NDA an award of "unpaid wages" that must be trebled under the Idaho Wage Claim Act, Idaho Code Sections 45-601 – 45-621. Appellant's Brief at 1, n.2. The NDA cannot properly be characterized as an employment contract. In both his Complaint and his Amended Complaint,

noncompetition clause, and Subsection 3.2 provides payment terms, including terms that provide for the cessation or reduction of any payment if Huber obtained alternative employment. *Id.* at NFO0341-42. As the trial court correctly held, Huber's recovery under the NDA does not represent "wages" under the Idaho Wage Claim Act because the amount of his recovery "***was not earned in increments as services were performed nor paid as direct consideration for services rendered.***" *R 677* (emphasis added).

This Court's holding in *Moore*, *supra*, supports the trial court's decision in the case at bar. In *Moore*, the plaintiff-employee (Moore) and the defendant Omnicare, Inc. (Omnicare) entered into an employment agreement with a five-year term of employment. 141 Idaho at 812-13. The agreement provided that if Omnicare terminated Moore's employment "without cause" prior to the end of the five-year term, Omnicare would pay Moore's base salary to him for the remainder of the five-year term. 141 Idaho at 813. Omnicare terminated Moore's employment before the end of the term. 141 Idaho at 814. An arbitration panel awarded $247,500 in damages to Moore for breach of the employment agreement but refused to treble the damage award, and the district court affirmed the panel's decision. *Id.* On appeal, this Court affirmed the district court's holding that the damages awarded to Moore were part of a liquidated damages provision in his employment agreement, were not compensation for services rendered, and therefore should

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Huber himself called the document the "Noncompetition Agreement." [*See, e.g., R 20, ¶ 12; R 197, ¶ 28*]. The document's actual title is "Deed of Non Disclosure, Non Competition and Assignment," ***not*** "Employment Contract" or "Employment Agreement." The NDA was simply "a ***term*** of the employment contract between [Huber] and [LFUSA]." *Ex. P-22* at NFO0344, § 14.1 (emphasis added).

not be trebled. 141 Idaho at 819-20. Citing to *Whitlock v. Haney Seed Co.*, 114 Idaho 628, 633 (Ct. App. 1988), the Court concluded that "Moore's damages most closely resemble a claim for 'future wages'" which do not fall within the purview of the mandatory trebling statute." *Id.*

This Court's ruling in *Moore*, and the rationale and authority underlying that ruling, fully support the district court's decision in the case at bar that any amount due Huber under the NDA was not a "wage." Huber's claim is no different from Moore's claim. Each of them has argued in effect that he was entitled to payment of his annual base salary on termination of his employment, as bargained for consideration under an employment agreement, if his employment was terminated without cause.[18] Under Huber's own view of the case, the judgment he recovered was not compensation for services rendered, but liquidated damages due and owing in the event LFUSA summarily dismissed Huber or terminated Huber's employment for substandard performance.[19] Moreover, no payment due under the NDA is labeled as or can properly be described as a "severance payment." As this Court stated in *Parker v. Underwriters Laboratories, Inc.*, 140 Idaho 517, 520 (2004), upon which Huber relies, "'Severance pay' has been defined as '[a] sum of money usually based on length of employment for which an employee is eligible upon termination.'" (Citation omitted.) Unlike a true severance payment,

[18] The concept of cause is inherent in the plain, ordinary meaning of the term "substandard performance." *See Whitlock v. Haney Seed Co.*, 114 Idaho 628, 632 (Ct. App. 1988) (there is no "genuine difference" between "good cause" and "unsatisfactory performance.").

[19] The Idaho Wage Claim Act requires employers to pay all wages due to an employee "at least once during each calendar month," IDAHO CODE § 45-608(1), and "upon separation from employment," IDAHO CODE § 45-606. ***The Act provides no cause of action for any payment that is due to a former employee after termination of employment.*** Such a payment would constitute "future wages," which cannot be trebled under the Idaho Wage Claim Act.

any payment due Huber under the NDA was not based on the length of his employment, and Huber was not eligible for payment upon termination of his employment as he would have been if the payment were severance. As the trial court correctly held, any payment due Huber under the NDA was subject to reduction or total loss if Huber competed with LFUSA or obtained other employment during the 12 months after the termination of his employment with LFUSA. *R 1982.*[20] As shown by Huber's own citation of authority, no payment under the NDA could be wages or severance pay because the payment was not consideration for Huber's labor or services as an employee. *See Parker*, 140 Idaho at 522 ("severance payments" given as consideration for release were not wages even though they were based in part on employee's salary and length of service); *see also Stevenson v. Branch Banking & Trust Corp.*, 861 A.2d 735, 749 (Md. App. 2004) (where termination compensation was payment for employee's covenant not to compete with employer after termination of employment, employee could not possibly perform all the work necessary to earn the termination compensation until after her employment ended, and termination compensation therefore did not constitute "wages" under the Maryland Wage Payment and Collection Law); *Gilliam v. Nev. Power Co.*, 488 F.3d 1189, 1196-97 (9th Cir.

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[20] Huber never testified that the NDA was a "severance agreement." He testified that he understood the NDA required him not to compete with LFUSA for 12 months after his employment ended and required him not to disclose LFUSA's confidential information. *Tr Vol. 4, p. 658, LL. 4-15.* Huber also never argued to the trial court that payment under the NDA was not contingent upon his compliance with the noncompetition provisions of the agreement. "The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal." *Barmore v. Perrone*, 145 Idaho 340, 343 (2008). In fact, he argued to the contrary. *Tr Vol. 1, p. 20, LL. 19-22.* (Huber's counsel states: "That's what this [NDA] is for, to compensate him for the years or services ***provided he doesn't compete*** . . . .") (emphasis added).

2007) ("[S]everance pay was not for services, but for [plaintiff's] voluntary termination of employment, confidentiality, non-competition, and waiver of claims against Nevada Power Company.").

B. The District Court Did Not Err in Refusing to Award Huber Prejudgment Interest before August 1, 2013.

"[P]rejudgment interest is allowed only where the damages are liquidated or readily ascertainable by mathematical process." *Ross v. Ross*, 145 Idaho 274 (Ct. App. 2007) (internal citation omitted). "[D]amages are unascertainable where some factor necessary to calculate the amount of damages must be determined by a trier of fact." *Id.* A trial court's order regarding prejudgment interest is subject to an abuse of discretion standard. *Id.* (citations omitted). In his claim for breach of the NDA, Huber pled that he had been "damaged in an amount to be proved at trial, but not less than the amount of Two Hundred Thousand Dollars ($200,000)." *R 197, ¶ 32.* Up until trial, the parties disputed Huber's base salary, a fact admitted by Huber. *See Tr Vol. 1, p. 20, LL. 1-8* (Huber's counsel stated: "We believe the 200,000 or the last year of wages that he would get under that non-competition agreement are justly due to him. . . . We may have a fight over what the salary was as that last year of employment. Was it 180,000? Was it 200,000?"). Moreover, as the trial court correctly held, any payment due Huber under the NDA was subject to reduction or total loss if Huber competed with LFUSA or obtained other employment during the 12 months after the termination of his employment with LFUSA. *R 1982.* Because the trial court needed to resolve the issue of the amount of Huber's base salary, the amount awarded Huber was subject to dispute, not liquidated or readily ascertainable by

mathematical process prior to trial, and, therefore, Huber is not entitled to additional prejudgment interest.

C. The District Court Correctly Held that the CSO Was a "Top Hat Plan" Under 29 U.S.C. § 1051(2) and Not Subject to ERISA's Vesting/Anti-Forfeiture Provision (29 U.S.C. §§ 1001-1061) or Funding Provision (29 U.S.C. §§ 1081-1086) Because It Was Not Funded.

A Top Hat plan is defined under ERISA's statutory scheme as: "A plan which is unfunded and maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." These plans are statutorily exempt from the participation, vesting, funding and fiduciary provisions of ERISA. *See* 29 U.S.C. §§ 1051, 1081(a)(3) & 1101(a)(1). "The failure of ERISA to provide nonforfeitability coverage to top hat plans is not an 'interstice' because it is the result of a deliberate decision to let executives use their positions of power to negotiate such protection for their plans on their own." *Bigda v. Fischbach Corp.*, 898 F. Supp. 1004, 1016 (S.D.N.Y. 1995), *aff'd*, 101 F.3d 108 (2d Cir. 1996).

Huber does not challenge the trial court's determination that the CSO was offered only to management and highly-compensated employees.[21] Instead, Huber contends that the CSO was "funded" and therefore fails to meet the statutory definition of a Top Hat plan. Here, the trial court concluded:

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[21] *Liponis v. Bach*, 149 Idaho 372, 374 (2010) (this court will not consider an issue that is not supported by argument and authority in the opening brief). In fact, Huber pled both that he was a member of management and a highly compensated employee and that the primary purpose of the CSO was to provide compensation to Huber. *R 201, ¶¶ 58-59.*

> The CSO was not funded. LFUSA did take out a one million dollar life insurance policy on Huber. If he passed away half of the proceeds would go to LFUSA and the other half to Huber's parents (later that beneficiary was changed to Huber's wife). The insurance policy was originally a term life policy. Later it was changed to part term life and part whole life. The policy was cancelled after Huber was terminated from employment. LFUSA ultimately received the cash value of the whole life portion of the policy.

R 1410. The trial court's holding is supported by the weight of authorities addressing the issue.

ERISA does not specify what requirements a plan must meet in order to be considered "unfunded." In fact, the term is somewhat of a misnomer because "[a]n employer may set aside deferred compensation amounts in a segregated fund or trust without jeopardizing a plan's 'unfunded' status if the fund or trust remains 'subject to the claims of the employer's creditors in the event of insolvency or bankruptcy.'" *IT Grp., Inc. v. IT Litig. Trust*, 448 F.3d 661, 665 (3d Cir. 2006) (citation omitted). Determination of the "funded" or "unfunded" status of a deferred compensation plan requires an examination of the surrounding facts and circumstances, including the plan's status under non-ERISA law. *In re IT Grp., Inc.*, 305 B.R. 402, 407. The existence of an ERISA plan within the statutory definition is a mixed question of fact and law.[22] Here, the trial court, weighing the credibility, testimony and evidence introduced at trial, held that the CSO was unfunded. Where the trial court based its finding on substantial evidence, even if the evidence is conflicting, this Court will not overturn those findings on appeal. *Benninger v. Derifield*, 142 Idaho 486, 488-89 (2006).

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[22] *See, e.g., House v. Am. United Life Ins. Co.*, 499 F.3d 443, 449 (5th Cir. 2007) ("mixed question of fact and law"); *Reliable Home Health Care, Inc. v. Union Cent. Ins. Co.*, 295 F.3d 505, 510 (5th Cir. 2002) ("existence of an ERISA plan is a question of fact" reviewed for clear error, but the "legal conclusions reached by the district court in applying those facts is [sic] de novo").

In determining whether a corporate plan is "unfunded," the Department of Labor, the entity responsible for overseeing ERISA plan compliance, has indicated that in evaluating this question "***great weight*** should be given to the tax consequences of such plans." *Reliable Home Health Care v. Union Cent. Ins. Co.*, 295 F.3d 505, 513-14 (5th Cir. 2002) (citation omitted) (emphasis added); *see also Miller v. Heller*, 915 F. Supp. 651, 659 (S.D.N.Y. 1996) (***a plan under which the beneficiaries do not incur tax liability during the year that the contributions to the plan are made is "more likely than not" an "unfunded" plan***) (emphasis added).

LFUSA submits that the holding in *In re Cheeks*, 467 B.R. 136 (N.D. Ill. 2012), and the cases cited therein, directly refute Huber's contentions on appeal. In *Cheeks*, Mark Hulbert (Hulbert), a former executive, filed an adversary action claiming the loss of a retirement account he asserted he personally owned in the amount of $125,000. *Cheeks*, 467 B.R. at 150. The account was a deferred compensation trust account created in Hulbert and his business partner's names pursuant to a "Deferred Compensation Agreement" between Chicagoland Foods, Inc. and Hulbert. *Id.* Hulbert argued that because the company "set aside" funds in an account, naming Hulbert as a co-owner, the account was funded and therefore not a Top Hat plan. The bankruptcy court disagreed. Notably, the court concluded that ***"[e]ven if it could be argued that the Trust funds in this case were segregated from [the Companies'] general assets, Plaintiff still could not establish any proprietary interest in the Trust's funds because Plaintiff did not treat the funds as his property for tax purposes."*** *In re Cheeks*, 467 B.R. 136, 154 (emphasis added). Citing to the leading authorities on the issue, the court in *Cheeks* explained:

> Several courts to have considered the issue found it appropriate to consider the tax consequences of the deferred compensation plan at issue. *See, e.g., IT Group, Inc.*, 448 F.3d 661, 668–69 (3d Cir.2006); *Reliable Home Health Care, Inc. v. Union Central Ins. Co.*, 295 F.3d 505 (5th Cir.2002). The Fifth Circuit Opinion quoted a holding by a District Court Judge in that Circuit, stating, ***"a 'plan is more likely than not to be regarded as unfunded if the beneficiaries under the plan do not incur tax liability during the year that the contributions to the plan are made.'"*** *Reliable Home Health Care, Inc., 295 F.3d at 514.* The rationale for this test looks to basic tax rules. In general, when an employer exchanges assets with an employee in return for services, any assets received by the employee are taxed as income to the employee. *Schroeder v. New Century Holdings, Inc.*, 387 B.R. 95, 109 (Bankr.D.Del.2008)**. . . . *With "unfunded" plans, the employee is not taxed on the compensation until she or he actually receives the deferred amount because "the employee may never receive the money if the company becomes insolvent.*"** *IT Group, Inc.*, 448 F.3d 661, 665 (3d Cir.2006). This is because the funds are available to the creditors of the company.

In re Cheeks, 467 B.R. 136, 154 (Bankr. N.D. Ill. 2012) (emphasis added). Applying the foregoing standard, the court in *Cheeks* held that Hulbert's failure to pay taxes was "***quite consistent with the conclusion that funds in that account were property of CFMC, not of the Plaintiff.***" *Id.*

Huber fails to address these authorities on appeal. Presumably this is because of the fact that Huber admits he did not pay taxes on any benefit under the CSO.[23] *Tr Vol. 4, p. 657, LL. 11-13.* In addition to failing to address the authorities holding that the failure of the plaintiff to pay taxes makes the plan ***more likely than not unfunded,*** the primary authorities cited by Huber did not concern Top Hat plans.[24] The main case relied on by Huber, *Dependahl v. Falstaff*

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[23] Payment of life insurance premiums by an employer is taxable income to the employee in the year of the premium payment. *See* 26 C.F.R. § 1.61-2(d)(2)(ii)(A) (life insurance premiums paid by an employer on the life of its employee are part of the gross income of the employee).

[24] Huber's reference to guaranteed benefit policies, as identified in *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 96, n.5, 114 S. Ct. 517 (1993),

Brewing Corp., 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968, 102 S. Ct. 512, 70 L. Ed. 2d 384 (1981),[25] involved a welfare benefits plan (an entirely different category of ERISA plan) that provided life insurance to a designated beneficiary for select employees. Less than eight years later the same court that issued the *Dependahl* opinion clarified its earlier holding and found that a salary continuance agreement, which provided retirement, disability and death benefits, constituted an unfunded excess benefit plan under ERISA. *Belsky v. First Nat'l Life Ins. Co.*, 818 F.2d 661 (8th Cir. 1987). The court in *Belsky* relied on the holding in *Belka v. Rowe Furniture Corp.*, 571 F. Supp. 1249 (1983). In *Belka,* the court held that a plan is "unfunded," where a life insurance policy would fund the employer's liability only in the rare instance of death and the company would ordinarily pay the benefits out of its general assets in the event of retirement or termination of employment. 571 F. Supp. at 1252.

It is undisputed that the CSO—like the plan in *Belka*—references life insurance only in the event of an employee death or disability, contemplating that in the more likely scenario of retirement or separation from service benefits would be paid from the general assets of LFUSA. Huber admitted as much in his briefing before the Court. *See R 230* ("Sources of financing are identified for various scenarios. In the event LUSA was sold, the proceeds of the sale would be

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is a red herring. Guaranteed benefit policies are defined in 29 U.S.C. § 1101(b)(2). The very first paragraph of section 1101 (like the majority of regulatory provisions) statutorily exempts Top Hat plans from coverage. *See* 29 U.S.C. § 1101(a)(1).

[25] C*f. Demery v. Extebank Deferred Comp. Plan*, 216 F.3d 283 (2d Cir. 2000) (life insurance contracts purchased by company to help pay for obligations under executive compensation plan did not render the plan "funded"); *Reliable Home Health Care, Inc. v. Union Cent. Ins. Co.*, 295 F.3d 505, 514 (5th Cir. July 10, 2002) (Top Hat plan found valid where benefits were funded and paid through whole life insurance policies).

the source of financing. . . . In the event of '[d]eath, ill health or incapacitation of' Huber, an insurance policy purchased by LUSA would be the source of financing. . . . In the event Huber retired or was terminated for some reason other than 'unsatisfactory performance', the source of financing was to be either shares or the general assets of LUSA.") (internal citations omitted). In addition, the fact that Huber returned or assigned the value of the benefit to LFUSA also demonstrates that Huber did not intend to look to a res separate from the general assets of LFUSA. *Tr Vol. 7, p. 1457, L. 18 – p. 1459, L. 4*; *Ex. P-88*. Recently, in *Precious Plate, Inc. v. Russell*, No. 06-CV-546C, 2011 WL 3667663, at *5 (W.D.N.Y. Aug. 22, 2011), the court found it dispositive that the participant had assigned his benefits under a life insurance policy to the corporation. In that case, as here, the plaintiff was the sole participant in a deferred compensation plan allegedly consisting of whole life insurance policies. Although the plan at issue did not contain specific language that the rights in the policy were those of an unsecured creditor, the court nonetheless found that the plan was an unfunded Top Hat plan.

D. The Trial Court Did Not Err in Holding that Huber's Right to Goodwill Under the CSO Was Subject to Forfeiture.

Huber's argument that the forfeiture clause is unenforceable because the benefits had been earned and were therefore "vested" is contrary to the law and is directly contradicted by Huber's own testimony at trial.[26] "Since ERISA intentionally omits top hat plans from its nonforfeitability protection, federal common law may not be used to create nonforfeitability

[26] During trial Huber testified that he understood—when he signed the CSO—that if his employment was terminated for unsatisfactory performance he would forfeit any benefit under the CSO. *See Tr Vol. 4, p. 653, L. 9 – p. 655, L. 8.*

protection under ERISA." *Bigda v. Fischbach Corp.*, 898 F. Supp. 1004, 1016 (S.D.N.Y. 1995), *aff'd*, 101 F.3d 108 (2d Cir. 1996) (rejecting plaintiff's argument that there is a "strong public policy against forced forfeiture" as demonstrating "ignorance of the structure of ERISA and the role of federal common law in cases governed by ERISA"). *See also Bryan v. Pep Boys-Manny, Moe & Jack*, CIV.A. 00-1525, 2001 WL 752645 (E.D. Pa. June 29, 2001) (rejecting "vesting argument" and holding Top Hat plan, under which executive earned benefits at two percent per year of participation, up to a maximum 25 years, was subject to forfeiture clause even after employee retires); *United States v. Graham,* 2007 WL 1806174 (E.D. Mich. 2007) (rejecting former executive's argument that the "bad boy" clause in his Top Hat plan was unenforceable because he had "vested," concluding that such an argument ***is stated without authority and runs contrary to the law***).

Huber's next argument, that forfeiture clauses are only enforceable where an employee competes or engages in illegal activity, is not supported by citation to a single authority and is inaccurate. *See Howard v. Clyde Findlay Area Credit Union, Inc.*, 2013 WL 4784913, *16 (N.D. Ohio 2013) (upholding forfeiture of an executive's Top Hat plan on a finding that the executive was terminated for cause). The executive in that case was terminated for cause following allegations he engaged in an inappropriate relationship with a human resources manager that led other employees to lose respect for the executive, creating a negative, distracting effect on the employer's day-to-day operations and establishing a negligent failure of the executive to perform his duties.

Finally, Huber's continued reliance on the 1984 decision rendered in *Hollenbeck v. Falstaff Brewing Corp.*, 605 F. Supp. 421 (E.D. Mo. 1984), is inappropriate. The decision in *Hollenbeck* was issued prior to enactment of the very provisions of ERISA that recognize an exception for Top Hat plans. As such, the court in *Hollenbeck* applied the federal common law as it existed pre-ERISA. Where application of the federal common law conflicts with Congress' statutory scheme concerning the forfeitability of Top Hat plans, it is of no effect. *See Bigda*, 898 F. Supp. at 1016. Even if this Court were to look to *Hollenbeck*, Huber would still not prevail. Any question as to whether Huber's impropriety would breach the business sensibilities of a hypothetical "reasonable" businessman should be dispelled by the trial court's finding that: "The deceit on Huber's part amounts to willful misconduct, is a serious breach of company policy and procedure, and is fraudulent behavior." *R 1415.*

E. The Trial Court Correctly Held that Huber's Benefits Under the CSO Were Forfeited.

"A cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal."). *Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 178 (2003). Huber fails to cite to a single excerpt from the record where he argued that his benefits should be awarded during periods of Huber's loyalty—assuming such periods could even be established. Separately, the only damages Huber sought at trial were damages based on a valuation date in 2012. *See Tr Vol. 3, p. 528, L. 25 – p. 529, L. 18* (Huber's expert did not offer an opinion as to the amount of Huber's alleged damages if the valuation date were August 1, 2011, or alternatively, 2006). Huber's counsel admitted that they did not

introduce evidence of an alternate valuation. *See Tr Vol. 7, p. 1553, LL. 20-22* ("Candidly, I don't think there is a specific line of testimony that says, well, I thought the equitable amount was X."). Nor may Huber ask this Court to reweigh the evidence of Huber's unsatisfactory performance. *See* IRCP 52(a); *Benninger v. Derifield*, 142 Idaho 486, 488-89 (2006); *Rowley v. Fuhrman*, 133 Idaho 105, 107 (1999); *Ransom v. Topaz Mktg.*, L.P., 143 Idaho 641, 643 (2006).

F. The Trial Court Did Not Err in Concluding that Huber Failed to Adequately Plead a Cause of Action for Equitable Relief.

In determining whether a plaintiff has adequately pled a right to equitable relief under 29 U.S.C. § 1132(a)(3), the plaintiff must have set forth the specific equitable relief requested. *See Rucker v. Benesight Inc.*, 2006 WL 2472673 (D. Idaho 2006) (holding that the plaintiff must set forth what, if any, equitable relief he seeks in order to adequately place defendant on notice of an ERISA claim for equitable relief). Huber did not seek equitable relief of any kind in his Complaint (*R 18-26*) or Amended Complaint (*R 192-206*). As the trial court correctly found, Huber did not try an equitable claim by implied or express consent of the parties. Huber fails to cite to any authority in support of his argument on appeal that the trial court erred. *See Liponis v. Bach*, 149 Idaho 372, 374 (2010) (this court will not consider an issue that is not supported by argument and authority in the opening brief).[27]

[27] Nor could Huber have successfully amended his Complaint to add a claim for equitable relief. *See* 29 U.S.C. Section 1132(e), which is the ERISA provision regarding jurisdiction that provides, in relevant part: "Except for actions under subsection (a)(1)(b) of this section, the district courts of the United States have exclusive jurisdiction of civil actions brought under this subchapter . . . . State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction under paragraphs (1)(B) and (7) of subsection (a) of this

G. The Trial Court Correctly Held that LFUSA Was the Prevailing Party, Entitling LFUSA to an Award of Attorney Fees and Costs.

The determination of prevailing party status is committed to the sound discretion of the district court. *Jorgensen v. Coppedge,* 148 Idaho 536, 537 (2010). In determining which party prevailed and is entitled to attorney fees, the court is "allowed to consider the presence and absence of awards of affirmative relief and determine which party, on balance, prevailed in the action."[28] *Burns v. Cnty. of Boundary*, 120 Idaho 623, 626 (Ct. App. 1990), *aff'd*, 120 Idaho 614 (1991). The trial court awarded LFUSA $284,464.76 in attorney fees and costs as the prevailing party and refused to award Huber any of his attorney fees or costs. *R 1988.* LFUSA submits that the trial court did not abuse its discretion in awarding attorney fees to LFUSA.[29] LFUSA unquestionably prevailed in this action. Huber originally sought over **$11 million** in damages,

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section. Equitable relief is defined in paragraph (a)(3)(B)—and therefore the district courts of the United States have exclusive jurisdiction to decide appropriate equitable relief."

[28] Claims preempted are properly categorized as "dismissed." *See, e.g., Atwood v. W. Constr., Inc.*, 129 Idaho 234, 240 (Ct. App. 1996) (affirming dismissal of state law claims preempted by ERISA). Thus, LFUSA is entitled to attorney fees under Idaho Code Section 12-120(3) because it prevailed on breach of the CSO contract and the implied covenant of good faith and fair dealing in the CSO.

[29] Huber affirmatively pled in paragraph 6 of Huber's Amended Complaint: "This lawsuit arises from a commercial transaction [as such term is defined in Idaho Code § 12-120(3)] between Huber and LFUSA. Paragraph 6 was incorporated by reference in support of every claim—including Huber's ERISA claim." *R 192-206. See Garner v. Povey*, 151 Idaho 462, 470 (2011), *reaff'g Magic Lantern Prods., Inc. v. Dolsot*, 126 Idaho 805 (1995) (holding "allegations in the complaint that the parties entered into a commercial transaction and that the complaining party is entitled to recover based upon [a commercial transaction], are sufficient to trigger the application of § 12-120(3).").

yet was only awarded $180,000. LFUSA prevailed *in toto* on five of Huber's six claims and prevailed in part on the sixth claim.[30]

Even if this Court were to find that the trial court improperly awarded attorney fees and costs pursuant to Idaho Code Section 12-120(3), this Court may affirm the award of attorney fees under 29 U.S.C. Section 1332(g) because all the elements necessary to support the finding are present in the record.[31] There is no conflict between the standard employed by the trial court and the standard under ERISA.[32] Attorney fees have been awarded against executives like Huber.[33]

The trial court's findings and the record support an award of fees under ERISA. The trial court concluded Huber's testimony was not credible. Huber's main argument on appeal is that

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[30] Huber sued, under the state law, for about $3.5M under the CSO, for $200,000 under the NDA, for a trebling of both amounts (to over $11M) as wages, for wrongful termination, and for breach of the implied covenant of good faith and fair dealing, and alternatively, for violation of ERISA. LFUSA obtained summary judgment on: (1) Huber's claim for breach of the CSO; (2) Huber's wage claims; and (3) Huber's claim for breach of the covenant. *R 621-44; 675-80.* At trial, LFUSA prevailed on Huber's wrongful termination and ERISA claim. *R 1409-21.* Huber did not completely prevail on his NDA claim because he recovered only $180,000.

[31] "It is well established that this Court will use the correct legal theory to affirm the correct decision of a district court even when it is based on an erroneous legal theory." *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 853 (1991).

[32] Although a litigant need not be deemed "a prevailing party" to receive attorney fees under section 1132(g)(1), the litigant must show some degree of success on the merits. *See Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 243, 252 (2010).

[33] *See Feinstein v. St. Luke's Hark*, CIV A, 10-4050, 2012 WL 4364641, *4 (E.D. Pa. Sept. 25, 2012) (attorney fees awarded against plaintiffs who acted in bad faith); *Estate of Shockley v. Alyeska Pipeline Serv. Co.,* 130 F.3d 403 (9th Cir. 1997) (district court did not abuse its discretion in awarding approximately 10% of requested attorney fees to retirement benefit plan in ERISA case); *Epstein v. Unum Life Ins. Co. of Am.*, CV 04-0400 SVW, 2004 WL 2418310, *3 (C.D. Cal. Oct. 13, 2004) (upholding award of fees for defendant where court found plaintiff and plaintiff's testimony not to be truthful).

Huber altered the legal status of the CSO through his own bad acts (*i.e.*, naming himself the owner of a life insurance policy). Such an argument demonstrates Huber's culpability and bad faith in bringing this action under ERISA. Huber mislead the trial court by failing to identify the totality of his assets, even lying about his employment status. Huber declared, under penalty of perjury, that he did not have a job as of December 20, 2014. *See R 1795, ¶ 3; R 1963 ¶ 7 & Ex. B* (a press release dated December 10, 2013, identifying Huber as being hired as Kahles USA's "new sales and business development manager").

H. The Trial Court Did Not Err in Denying Huber's Motion for Fees and Costs.

Huber's assertion that he prevailed "in total" on his only state law claim is erroneous. *See* § G, *supra.*

I. Huber's Claim for Attorney Fees on Appeal Should Be Denied, and LFUSA's Claim for Attorney Fees on Appeal Should Be Granted.

LFUSA requests attorney fees and costs on appeal pursuant to Idaho Appellate Rules 40 and 41, Idaho Code Sections 12-121 and 12-120(3), and 29 U.S.C. Section 1332(g) for the reasons set forth in Section G, *supra*, as well as upon the following grounds. As it relates to Huber's claims under the CSO, Huber does not present a genuine issue of law. Huber's argument on appeal relies on opinions that did not concern Top Hat plans. Huber fails to address the majority rule, as well as the U.S. DOL's view that have held that a plan is ***more likely than not unfunded*** where, as here, the employee does not pay taxes on any plan benefit. Moreover, Huber's contention that LFUSA ***intended*** the cash value of any life insurance policy to be available to him if he left the company is untrue. Huber himself testified that he did not have LFUSA's permission to name himself as owner of any policy and did not mean for that to

happen. Huber further testified and introduced evidence that he returned the cash value (only $14,000) because "***It was theirs***." Finally, Huber's citation to *Hollensbeck v. Falstaff Brewing Corp.,* for the proposition that the trial court should have applied the law as it existed prior to the enactment of ERISA and the Top Hat exemption, does not present a genuine issue of law. The holding in *Hollenbeck* did not concern a Top Hat plan and has not been cited in a single opinion addressing forfeiture clauses in Top Hat plans in the ***thirty (30) years*** since the opinion was issued. *See Bigda, supra,* 898 F. Supp. 1004, 1016 ("Since ERISA intentionally omits top hat plans from its nonforfeitability protection, federal common law may not be used to create nonforfeitability protection under ERISA.").

III. CONCLUSION

For the foregoing reasons, LFUSA respectfully requests that this Court affirm the trial court's holdings and award LFUSA its reasonable costs and attorney fees on appeal.

DATED this 23rd day of April, 2015.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Andrea J. Rosholt – Of the Firm
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of April, 2015, I caused a true and correct copy of the foregoing **RESPONDENT'S REPLY BRIEF** to be served by hand delivery addressed to Jeff R. Sykes and Chad M. Nicholson, McConnell Wagner Sykes & Stacey PLLC, 755 W. Front St., Suite 200, Boise, ID 83702.

_____
Andrea J. Rosholt